MALAYSIAN REPORTS

OOI CHOON LYE v. LIM BOON KHENG & ORS.

[F.C. (Ong C.J. (Malaya) Gill F.J. & Raja Azlan Shah J.) March 24, 1971]

[Kuala Lumpur — Federal Court Civil Appeal No. 37 of 1970]

Evidence — Witness — Impeachment of credit — Statement to police in course of investigation — Admissibility of in civil case — Evidence Ordinance, 1950, ss. 145 and 155(c).

A statement to the police in the course of investigation is admissible for the purpose of impeaching the credit of a witness in a civil case, there being no prohibition against its use in a civil case so long as it is relevant to the subject matter of the case.

[**Editorial Note:** As the main issue in this case was one of fact and as the learned trial judge based his decision on the opinion he formed as to the comparative reliability of witnesses, it was not open to the Federal Court, as an appellate court, to interfere with that decision. Therefore this report is only in respect of that portion of Gill F.J.'s judgment which dealt with the admissibility in a civil case of a statement made during the course of police investigation.]

Case referred to:-

(1) *Goh Beng Seng* v. *Dol bin Dolah* [1970] 2 M.L.J. 95.

FEDERAL COURT.

Dato' Eusoffe Abdoolcader (*K. K. Chong* with him) for the appellant.

Dato' David Marshall (*Lim Ewe Hock & Mrs. H. H. Oon* with him) for the respondent.

Gill F.J.: ... One of the points of law taken by counsel for the appellant was that the learned trial judge was wrong in allowing Lee Soo Shung (PW2) to be cross-examined on the statement which he had made to Police Superintendent Dershan Singh, it being argued that that statement was inadmissible in evidence. I agree that that statement is not substantive evidence, as was decided by Sharma J. in the case of *Goh Beng Seng* v. *Dol bin Dolah*,(1) on which counsel for the appellant based his argument, but it is clear from section 145 read in conjunction with section 155(c) of the Evidence Ordinance, 1950 that that statement was admissible for the purpose of impeaching the credit of that witness. I think it is a well established rule that every witness upon cross-examination in any civil or criminal proceedings may be cross-examined on a former statement made by him relative to the subject matter of the case and inconsistent with his present testimony. Counsel for the appellant argued that such former statement must be a voluntary statement. For this argument he relied on a heading of a paragraph in *Sarkar* on Evidence (11th edition) page 1291. The words of the paragraph, however, do not support his argument. In any event, how can it be said the statement we are concerned with was not a voluntary statement? It may be argued that this statement was taken in the course of a police investigation under the provisions of the Criminal Procedure Code, and that as such it could be used only in criminal proceedings. I do not think there is any prohibition against its use in a civil case, so long as it is relevant to the subject matter of the case. The police may refuse to furnish a party to a civil action with a copy of such a statement, which I think they are entitled to do, but that is no reason why, if the deputy public prosecutor chooses to supply it, as he did in this case, it cannot be used for the purpose of cross-examination.

....

Order accordingly.

Solicitors: *Presgrave & Matthews; Lim, Lim & Oon.*

FOO KOK FOO v. YAP HAI CHWEE & ORS.

[O.C.J. (Mohamed Azmi, J.) November 17, 1971]

[Kuala Lumpur — Civil Suit No. 1226 of 1968]

Negligence — Road collision — Contributory negligence — Apportionment of blame.

Damages — Quantum — Loss of left-arm — Contributory negligence.

This was a claim for damages for personal injuries and loss suffered by the plaintiff caused by the negligence of the second defendant.

On March 27, 1967, the plaintiff was travelling as a paying passenger in a motor taxi driven by the fourth defendant, when a motor lorry driven by the second defendant suddenly reversed from a side lane and collided with the near-side of the motor taxi. As a result of the impact, the plaintiff, who was seated in front, sustained injuries. His left arm was completely severed at mid-arm level and he also suffered a small laceration on the left lower eye-lid with contusion of the left eye.

The first and second defendants admitted liability, subject to the issue of contributory negligence by the plaintiff. After the close of case for the defendants, the plaintiff withdrew the case against the third and fourth defendants, the registered owner and the driver of the taxi, respectively.

Therefore, the court had to determine whether there was any contributory negligence by the plaintiff, and the quantum of damages to be awarded.

Held: (1) on the balance of probabilities, and on the finding of fact, the plaintiff's left arm was outside the window of the taxi at the time of the collision. This conduct constituted a lack of reasonable care on the plaintiff's part for his own safety, and therefore it was not necessary to show that his conduct amounted to a breach of duty to the taxi driver;

(2) the plaintiff was guilty of contributory negligence to the extent of 25% whilst the second defendant was 75% to blame;

(3) general damages of $25,365, and $4,950 special damages and costs were to be awarded to the plaintiff.

Per Mohamed Azmi J.: "... when travelling in a motor car along a road where traffic is heavy, whether as a driver or a passenger, a person ought to be conscious that it is extremely dangerous even to rest his arm on the door window with or without the elbow protruding. The various follies of road users in a city ... are so common nowadays that they ought to be foreseeable and a prudent man should, when travelling in such a place, keep both his hands well inside his vehicle".

Cases referred to:-

(1) *Nance* v. *British Columbia Electric Railway Co. Ltd.* [1951] A.C. 601 at p. 611; [1951] 2 All E.R. 448 at p. 450.

(2) *Goh Beng Seng* v. *Dol bin Dolah* [1970] 2 M.L.J. 95.

(3) *Khatijah binte Abdullah* v. *Lee Leong Teh & Anor.* [1940] M.L.J. 87.